In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM, PETITIONER

v.

DEAN RUSK, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions of the court of appeals (Pet. App. 3–9; R. 14–21)[1] are reported at 361 F. 2d 102. The opinion of the district court (Pet. App. 10–18; R. 2–11) is reported at 250 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1966 (Pet. App. 1–2; R. 22). The petition for a writ of certiorari was filed on August 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the Appendix to petitioner's brief in the court of appeals.

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STATUTE INVOLVED

Section 401 of the Nationality Act of 1940, 54 Stat. 1168, as amended, 58 Stat. 746, 8 U.S.C. 801 (1946 ed.), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.[2]
>
> * * * * *

QUESTION PRESENTED

Whether this Court should reconsider its decision in *Perez* v. *Brownell*, 356 U.S. 44, which held that the Constitution empowers Congress to provide that a person who voluntarily votes in a political election in a foreign state shall lose his American citizenship.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit affirming the determination of the district court that he had lost his American citizenship under Section 401(e) of the Nationality Act of 1940, as amended, by virtue of having voluntarily voted in a political election in the State of Israel. The facts, which were stipulated in the district court (R. 12–13) are as follows.

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[2] Section 401(e) was reenacted as Section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267–268, 8 U.S.C. 1481(a)(5).

Petitioner was born in Poland in 1893. He emigrated to the United States in 1912 and became a naturalized American citizen in 1926. On July 30, 1951, he voluntarily voted in the elections for the Second Knesset, the Parliament of the State of Israel.[3] The stipulation recites that this was a political election in a foreign state within the contemplation of Section 401(e). On November 14, 1960, the American Vice Consul at Haifa, Israel, issued a Certificate of Loss of Nationality to petitioner. This action was approved by the Passport Office of the Department of State on January 4, 1961, and on May 3, 1965, by the State Department Board of Review.

ARGUMENT

In *Perez* v. *Brownell,* 356 U.S. 44, this Court sustained the validity of Section 401(e) against broad-ranging constitutional challenge, as applied to a native-born American having dual American-Mexican citizenship who had voluntarily voted in a political election in Mexico. The Court found the provision rationally related to the foreign affairs power of Congress and further deemed the act of voting in a foreign political election to be in some measure inconsistent with a

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[3] Petitioner contends that neither at the time of the election nor at any other time did he intend to abandon his American citizenship and that he considered himself at all times an American citizen and does so now. Respondent refused to stipulate to the truthfulness of these contentions, maintaining that they were irrelevant to the question of loss of citizenship under Section 401(e) "since a specific intent or desire to lose or abandon American citizenship is not a requisite for expatriation under Section 401(e) of the Nationality Act of 1940" (R. 12).

claim of American citizenship. The Court said (356 U.S. at 60-61):

> The critical connection between this conduct [voting in a foreign political election] and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

Petitioner argues that subsequent decisions of this Court teach that denationalization is only proper where predicated upon an act signifying a dilution or change of allegiance (Pet. 6). However that may be, voting in a foreign political election is such an act; Congress was entitled to find that it imports significant elements of allegiance to the foreign country in question which are inconsistent with undivided allegiance to the United States. Compare *Savorgnan* v. *United States*, 338 U.S. 491, where this Court upheld the denationalization of a woman who took an oath of allegiance to a foreign country even though she had no intention by that act to renounce her American citizenship. The decisions on which petitioner relies involved

no such question and took pains to distinguish *Perez*. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164; *Schneider* v. *Rusk*, 377 U.S. 163, 166–167. In *Mendoza-Martinez*, the statute in question denationalized persons who had gone abroad to evade military service. See, also, *Trop* v. *Dulles*, 356 U.S. 86. This was not conduct which imported an allegiance to a foreign country. In *Schneider* the statute in question denationalized naturalized citizens who resided in the country of their origin for three years, and this Court held that the statute discriminated impermissibly between native-born and naturalized citizens.[4]

CONCLUSION

There is no persuasive reason for this Court to re-examine its considered and relatively recent ruling in *Perez* v. *Brownell*, 356 U.S. 44. Accordingly, the petition for a writ of certiorari should be denied.

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SEPTEMBER 1966.

[4] Petitioner's First Amendment argument is, we believe, unsound. There is no constitutional right to participate in the political processes of a foreign state.

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MEMORANDUM

Supreme Court, U.S.
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Respondent.

MEMORANDUM SUPPLEMENTAL TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The following statistics, received from the Department of State since the filing of the petition herein, demonstrate the ongoing impact of the expatriation provision at bar, on the Fourteenth Amendment guarantee of citizenship.

"There follows a table showing the number of United States citizens who have been administratively held by the Department to have lost citizenship under Section 401(e) of the Nationality Act and Section 349(a)(5) of the Immigration and Nationality Act during the five year period 1961 through 1965.

	Sec. 401(e)	Sec. 349(a)(5)
1961	845	783
1962	544	471
1963	395	750
1964	306	402
1965	365	515
	2,455	2,921

During the first six months of this calendar year the Department determined that 167 citizens of the United States had lost citizenship under Section 401(e) of the Nationality Act and 258 others had become expatriated under Section 349(a)(5) of the Immigration and Nationality Act."

(Letter to Petitioner's attorney from Robert D. Johnson, Deputy Director, Passport Office, dated September 7, 1966, in reply to request for information for use in instant case.)*

Respectfully submitted,

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* Indicative of the human components contributing to the foregoing figures is a recent news item: "Mrs. Bruce Lepper, formerly of Closter, N. J., and now wife of an English student . . . tells in London of plight. She voted in British elections in March, after being assured by a British election officer that her voting would not prejudice her national status. But U. S. Embassy says voting probably has cost her citizenship." (New York Times for August 9, 1966, p. 12, col. 4.)